In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-751

VINCENT PACELLI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in refusing to order a psychiatric examination of the key government witness and in excluding expert psychiatric testimony bearing on the credibility of that witness.

After a second jury trial[1] in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to violate the civil rights of a government witness by causing her death before she could exercise her right to testify, in violation of 18 U.S.C. 241 (Count 1), and of forcibly impeding the giving of testimony by the same witness, in violation of 18 U.S.C. 1503 (Count 2). He was sentenced to a term of life imprisonment on

[1]Petitioner's original convictions for the same offenses were reversed because of the use of inadmissible hearsay evidence. *United States* v. *Pacelli*, 491 F.2d 1108 (C.A. 2). He thereafter sought certiorari on an issue decided against him by the court of appeals, and this Court denied the petition. 419 U.S. 826.

Count 1 and to concurrent term of five years' imprisonment on Count 2. These terms were to be served consecutively to a twenty-year and a fifteen-year term of imprisonment previously imposed upon petitioner for narcotics convictions. The court of appeals affirmed (Pet. App.; 521 F.2d 135).

The evidence at trial showed that on May 27, 1971, Patsy Parks testified before a federal grand jury in the Southern District of New York, which later indicted petitioner, his wife, and two others for narcotics violations (Tr. 70-80).[2] On February 3, 1972, government agents unsuccessfully attempted to serve Parks with a subpoena for her appearance at petitioner's trial on the narcotics charges, then scheduled to begin on February 8, 1972 (Tr. 82-84, 93-95, 124-126). Shortly after midnight on February 4, 1972, Parks, who had learned of the attempted service, went to the Hippopotamus, a New York discotheque, where she approached Barry Lipsky and told him that she urgently wanted to see petitioner about the subpoena (Tr. 126-129, 135, 170-171, 209-212, 219-222, 805-806). Lipsky, who was then employed by petitioner in the narcotics business, responded that petitioner could not be reached by telephone, that he planned to meet him later in the day, and that he would tell petitioner that Parks wanted to speak to him. Parks, however, insisted that she had to see petitioner that very night (Tr. 214, 223-225).

Lipsky went to petitioner's apartment and told him that Parks was at the Hippopotamus, that some men had at-

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[2]Parks testified before the grand jury that on April 22, 1971, petitioner had received a box of money from Frank Cerano at her apartment, and that on April 18, 1971, petitioner and others had been in and out of her apartment several times in an attempt to resolve a problem over returning to Detroit or Chicago a paper bag full of money that had been stashed in her apartment (Tr. 76-80).

tempted to subpoena her, and that she wanted petitioner's advice (Tr. 226-228). Petitioner immediately responded, "It's that box. It's that God-damned box. She has been to the grand jury and she ratted me out. I know what I have to do" (Tr. 228-229). Petitioner asked Lipsky if he wanted to go with him, and Lipsky agreed. They then drove in petitioner's rented car to the discotheque, stopping en route to buy four one-gallon cans of gasoline after petitioner told Lipsky that they would need it to burn Parks' body. The two then continued on to the Hippopotamus, where they arrived between 2:00 and 2:30 a.m. on February 4 (Tr. 229-237, 756-757, 762-766, 775-776).

Lipsky entered the Hippopotamus, found Parks, told her that petitioner was parked nearby, and asked her to wait a few minutes before meeting him there. Parks left the discotheque and was followed shortly by Lipsky. When Lipsky arrived at petitioner's car, petitioner was behind the wheel and Parks was seated next to him. After Lipsky got in the back seat petitioner drove toward Long Island (Tr. 237-242, 809).

During the drive, petitioner questioned Parks about her knowledge of his pending narcotics prosecution, about the box, and about the attempt to serve her with the subpoena. He also offered her money to go to Brazil or California, but Parks refused. After driving for approximately an hour, petitioner stopped the car on a dirt road and pretended to make a telephone call at a nearby phone booth. Upon returning to the car, petitioner got into the back seat and Lipsky moved to the driver's seat. As soon as Lipsky drove off, petitioner raised up over the front seat, wrapped his left arm around Parks' head, and plunged a knife once into her neck and a dozen more times into her chest (Tr. 242-250, 1004-1006, 1016). Petitioner then instructed Lipsky to drive to a deserted wooded area, where they pulled Parks' body onto the roadway, doused it with gasoline, and ignited it (Tr. 250-253).

Petitioner's defense essentially was an attack upon the competency and credibility of Lipsky, the key government witness. In a pre-trial motion, which was renewed at trial (Tr. 654-655), petitioner sought to have Lipsky examined by a psychiatrist, Dr. David Abrahamsen, in order to aid the district court in its determination of Lipsky's competency to testify as a witness. The court refused to order the requested examination or to admit the proffered testimony of the psychiatrist (Tr. 655, 1232) who, through observation of Lipsky and a review of his testimony, had diagnosed him as a pathological liar.

1. Petitioner contends (Pet. 10-13, 16) that the district court committed reversible error in refusing to order Lipsky to submit to a psychiatric examination before permitting him to testify. The determination of the competency of a witness, however, is addressed to the discretion of the trial court, which is under no obligation to order a mental examination or to seek other evidence in deciding the issue. See, *e.g.*, *United States* v. *Barnard*, 490 F.2d 907, 912 (C.A. 9), certiorari denied, 416 U.S. 959; *United States* v. *Heinlein*, 490 F.2d 725, 730 (C.A.D.C.); *United States* v. *Butler*, 481 F.2d 531, 534 (C.A.D.C.); *United States* v. *Benn*, 476 F.2d 1127, 1130-1131 (C.A.D.C.); *United States* v. *LaBarbera*, 463 F.2d 988, 990 (C.A. 7); *United States* v. *Skillman*, 442 F.2d 542, 560 (C.A. 8), certiorari denied, 404 U.S. 833; *United States* v. *Russo*, 442 F.2d 498, 503 (C.A. 2), certiorari denied, 404 U.S. 1023.[3]

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[3]Petitioner's contention (Pet. 16) that there exists a conflict among the circuits on this issue is erroneous, since none of the decisions on which he relies has imposed a duty on the trial court to conduct a mental examination of a prosecution witness. In *United States* v. *Butler*, 481 F.2d 531 (C.A.D.C.), and *United States* v. *Benn*, 476 F.2d 1127 (C.A. D.C.), the court of appeals affirmed the defendants' convictions, holding that the district court's refusal to order an examination was within its discretion. Furthermore, petitioner's assertion (Pet. 12)

Indeed, the modern trend of decisions, as reflected in the Federal Rules of Evidence, is that incompetency is no longer a ground for disqualifying a witness in a criminal trial and that a preliminary examination into competency is therefore unnecessary. See, *e.g.*, Rule 601, Fed. R. Evid.; *United States* v. *Jones*, 482 F.2d 747, 751-752 (C.A. D.C.); *United States* v. *Davis*, 486 F.2d 725, 726 (C.A. 7), certiorari denied, 415 U.S. 979; *United States* v. *Davis*, 473 F.2d 1023, 1025 (C.A. 10). As the Advisory Committee's Note to Rule 601 of the Federal Rules of Evidence explains, the question of a witness' mental qualifications "is one particularly suited to the jury as one of weight and credibility." Petitioner's extensive cross-examination of Lipsky (Tr. 294-679, 720-733), most of which was devoted to Lipsky's credibility rather than to his eyewitness account of the crimes, fairly gave the jury the "opportunity to appraise the credibility of the witness in the light of the facts impugning his veracity." *United States* v. *Russo*, *supra*, 442 F.2d at 502.

In any event, as the district court noted in denying petitioner's request for a psychiatric examination of Lipsky, petitioner had "not made out a good enough case" (Tr. 655) to overcome the presumption against such examinations. The court's conclusion is clearly correct, since (1)

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that a hearing was required because Lipsky was addicted to cocaine is unsupported by the record. The only evidence of Lipsky's use of cocaine was his testimony that he had last used cocaine on March 2, 1972 (almost three years before trial) and that he had not taken narcotic drugs of any kind during the trial (Tr. 295, 425). The present case is therefore distinguishable from *Hansford* v. *United States*, 365 F.2d 920 (C.A.D.C.), where it was held to be error to fail to conduct a hearing on the competency of the *defendant* after it was shown that he had a life history of narcotics addiction and that he had been using narcotics throughout the trial. See also *Gurleski* v. *United States*, 405 F.2d 253, 267 (C.A. 5), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 977.

Lipsky previously had testified exhaustively in five recent trials, before different district judges, involving petitioner and others (Tr. 68, 286-287, 299-300, 314, 353-359, 426, 588-589); (2) Lipsky had undergone a court-ordered psychiatric examination in December 1972 and had been found competent to stand trial for Parks' murder (Tr. 374-375, 389, 420-421, 960-961, 1181-1182); (3) Dr. Abrahamsen, the psychiatrist called by petitioner, specifically testified that an examination of Lipsky would not have assisted him in forming his conclusions about Lipsky's mental condition (Tr. 1155); and (4) Lipsky's testimony was corroborated by other evidence in the case.[4] See *United States* v. *Gerry*, 515 F.2d 130, 137 (C.A. 2), certiorari denied, No. 74-1480, October 6, 1975.

2. The district court also properly refused to allow Dr. Abrahamsen to testify that, in his opinion, Lipsky suffered from a psychopathic disorder that prevented him from telling the truth. This Court has recently reiterated the accepted rule that "the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testi-

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[4]The court of appeals noted (Pet. App. 5090; 521 F.2d at 137):

> Parks was placed by witnesses in the Hippopotamus on the night and at the time testified to by Lipsky; the night attendant at the gasoline station identified Lipsky as the purchaser of four gallon cans of gasoline at about 2:30 a.m. one morning; a knife was found in the mud of a bay area two blocks from Pacelli's residence where Lipsky stated they had disposed of the murder weapon. There was also evidence that the same rented car in which the murder was committed was again rented by Pacelli's drug partner, Al Bracer, on February 16, 1972 and was found engulfed in flames two days later in Fairfield, New Jersey, at a time when Lipsky was hiding in Florida. Chemical inspection disclosed that there was gasoline throughout the interior of the car and indicated, although not conclusively, that traces of blood were present on the floor carpet.

mony." *Hamling* v. *United States*, 418 U.S. 87, 108. The court's exercise of discretion in such matters may not be overturned "unless manifestly erroneous." *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35. See also *United States* v. *Barnard, supra*, 490 F.2d at 912-913; *United States* v. *Benn, supra*, 476 F.2d at 1130-1131. Here, the court issued its ruling after it had conducted an extensive preliminary hearing out of the presence of the jury (Tr. 1122-1232), which revealed that the psychiatrist's testimony would be "of no use to the jury" (Tr. 1232).

The trial court's finding that Dr. Abrahamsen's expert testimony was unnecessary, which the court of appeals expressly affirmed after its independent review of the psychiatrist's *voir dire* examination (Pet. App. 5096-5099; 521 F.2d at 140-141), was within its discretion. The general test for admissibility of such testimony is whether it will be of appreciable help to the jury in an area "beyond the ken of the average layman * * *." *United States* v. *60.14 Acres of Land*, 362 F.2d 660, 667 (C.A. 3), quoting from *Jenkins* v. *United States*, 307 F.2d 637, 643 (C.A.D.C.). In *Salem* v. *United States Lines Co., supra*, 370 U.S. at 35, the Court stated:

> [E]xpert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training * * *."

Here, the psychiatrist's diagnosis that Lipsky was a pathological liar was based totally upon facts that had been brought out before the jury (Pet. App. 5097; 521 F.2d

at 140-141),[5] which also was charged that, since Lipsky was an accomplice by his own admission, his testimony was suspect. As Dr. Abrahamsen himself conceded (Tr. 1182-1185), even without his testimony the jury was fully capable of determining whether Lipsky's account of any given event was true. Thus, receipt of the "expert" diagnosis may have caused the jury "to surrender [its] own common sense in weighing testimony," *United States* v. *Barnard, supra*, 490 F.2d at 912, and, as the court of appeals concluded, "could only have involved the jury in a trial within a trial causing further irrelevant distraction" (Pet. App. 5097; 521 F.2d at 141).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

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[5]Indeed, Dr. Abrahamsen's conclusion that Lipsky was incapable of telling the truth relied primarily upon *Lipsky's* trial testimony that he had repeatedly lied in the past, had frequently used cocaine, and had engaged in several episodes of eccentric behaviour (Tr. 1153-1155, 1171-1173, 1177-1179, 1185-1187).

[6]*United States* v. *Partin*, 493 F.2d 750 (C.A. 5), and *United States* v. *Crosby*, 462 F.2d 1201 (C.A. D.C.), on which petitioner relies (Pet. 16), involve dissimilar situations. In *Partin*, the court of appeals held that a psychiatrist could testify that a witness suffered from a mental disorder, documented by hospital records, that affected his ability to see and hear the events he was reporting to the jury. Petitioner does not claim that Lipsky could not perceive reality—only that he lied about it. In *Crosby*, the court of appeals held that, in determining the competency of a key government witness who was shown to have used drugs on the day of the trial, the trial court erred in refusing to examine an existing medical record of the witness.